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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 297

T. L. MORRIS, L. HUGH MORRIS, M. N. MORRIS, Z. B. FREEMAN, AND J. L. F. BEASLEY, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 216–228) is reported in 112 F. (2d) 522.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 11, 1940 (R. 228). A petition for rehearing (R. 229–233) was denied July 8, 1940 (R. 234). The petition for writ of certiorari was filed August 1, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated March 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment was duplicitous.

2. Whether evidence of transactions similar to those charged in the indictment was improperly received.

3. Whether the petitioners were prejudiced by the remarks of the trial court in sustaining an objection to a question asked on cross-examination by defense counsel.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud statute (Sec. 215, Criminal Code; U. S. C., Title 18, Sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice * * *, place, or cause to be placed, any letter, postal card, * * *, in any post office, * * *, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, * * *, shall be fined not more than $1,000, or imprisoned not more than five years, or both (R. S. § 5480; Mar. 2, 1889, c. 393, § 1, 25 Stat. 873; Mar. 4, 1909, c. 321, § 215, 35 Stat. 1130).

STATEMENT

An indictment in eleven counts was returned against the petitioners and others in the District Court of the United States for the Western District of Louisiana (R. 2–28). Each count charged the defendants with a use of the mails in furtherance of a scheme to defraud and to obtain money and property by means of false and fraudulent representations, pretenses, and promises, in violation of Section 215 of the Criminal Code.

On the first trial the jurors were unable to agree upon a verdict (R. 78–79). At the second trial, the one here involved, the petitioners were found guilty on all counts of the indictment (R. 44, 202). On the first count petitioners L. Hugh Morris and J. L. F. Beasley were each sentenced to imprisonment for three years and the petitioners T. L. Morris and Z. B. Freeman to imprisonment for five years and to pay a fine of $1,000. On the remaining counts imposition of sentence on these petitioners was suspended for a period of five years after the expiration of the sentence on count one, and they were placed on probation (R. 50–53).[1] Imposition of sentence on petitioner M. N. Morris was as to all counts apparently suspended and he was placed on probation for a period of

[1] Since the imposition of sentence upon these petitioners was suspended as to all counts except the first, it follows that they can only appeal from the judgment as to that count. See *Berman* v. *United States*, 302 U. S. 211, 212–213.

three years (R. 66, 68).[2] On appeal the Circuit Court of Appeals unanimously affirmed the judgments of conviction (R. 216–228).

Petitioners do not question the sufficiency of the evidence to sustain their convictions. A comprehensive analysis of the indictment is contained in the opinion of the Circuit Court of Appeals (R. 217–220). Briefly summarized, the indictment alleged that the defendants devised a scheme to defraud and to obtain money and property from certain named individuals and others by means of false and fraudulent representations, pretenses and promises. The scheme was to be carried out by the defendants through their organization and operation of various insurance corporations and the sale of life insurance, under false and fraudulent representations, not only to the individuals named, but to approximately 55,000 other persons, consisting principally of that class of the aged who were unable to obtain life insurance from legitimate companies and of those persons who, by reason of purported low premium rates and the lack of the requirement of medical examination,

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[2] This petitioner's notice of appeal and the docket entries of the District Court (R. 66, 68) indicate the suspension of imposition of sentence as to all counts. This view is fortified by the fact that the record does not contain any judgment with reference to this petitioner. If imposition of sentence was suspended upon all counts, this petitioner was not entitled to appeal and is therefore not properly in this Court. See *Berman* v. *United States*, *supra*.

could be persuaded to purchase the policies and certificates of defendants' companies.

ARGUMENT

I

Petitioners contend that the indictment is duplicitous because it charged the defendants with devising not one but several schemes, i. e., two schemes to defraud separate corporate entities and a third scheme to obtain money and property by false and fraudulent representations and promises from individuals. It is apparent from the analysis of the indictment contained in the opinion of the Circuit Court of Appeals (R. 217–220) that the indictment charged but one general scheme—a scheme to defraud and to obtain money and property by false and fraudulent representations from those persons whom the defendants could induce to purchase life insurance from the companies organized and operated by them. The allegations with reference to the transfer to the defendants' American Benefit Association of the business and funds of other insurance companies (R. 5) were obviously merely the detailing of steps which the defendants employed in carrying out their scheme to defraud policy holders. As the Circuit Court of Appeals said (R. 220):

> The alleged scheme to defraud was large and necessarily had many angles to it. It is natural that a scheme of this magnitude

> would have many parts and in order to set it out properly, extensive averments were required. The indictment, however, embraces only one scheme.

It has been often held that the setting out in a mail-fraud indictment of the various means and devices by which the fraudulent scheme is to be effectuated does not render the indictment duplicitous. *Silkworth* v. *United States,* 10 F. (2d) 711, 714 (C. C. A. 2d), certiorari denied, 271 U. S. 664; *Sunderland* v. *United States,* 19 F. (2d) 202, 207 (C. C. A. 8th); *Worthington* v. *United States,* 64 F. (2d) 936, 938 (C. C. A. 7th); *Greenbaum* v. *United States,* 80 F. (2d) 113 (C. C. A. 9th).

Petitioners also contend that the mail fraud statute differentiates between a scheme to defraud and a scheme to obtain money by false and fraudulent representations, pretenses and promises and that the statute makes each a separate offense. They therefore assert that an indictment which, as here, charges that the scheme had as its objects both a defrauding and the obtaining of money by false representations, pretenses and promises, is duplicitous. This contention, however, overlooks the fact that the gist of the offense is the use of the mails.[3] This being so, it follows that but one

[3] *Durland* v. *United States,* 161 U. S. 306, 315; *Van Riper* v. *United States,* 13 F. (2d) 961, 967 (C. C. A. 2d); *Havener* v. *United States,* 49 F. (2d) 196, 198 (C. C. A. 10th), certiorari denied, 284 U. S. 644; *Rude* v. *United States,* 74 F. (2d) 673, 675 (C. C. A. 10th).

offense is committed by each use of the mails even though such use is in pursuance of a scheme having both of the objects recited in the statute. An indictment charging the use of the mails in furtherance of such a scheme is, therefore, not duplicitous. *Hass* v. *United States,* 93 F. (2d) 427, 432 (C. C. A. 8th); *Norcott* v. *United States,* 65 F. (2d) 913, 916 (C. C. A. 7th), certiorari denied, 290 U. S. 694; *Livezey* v. *United States,* 279 Fed. 496, 498–499 (C. C. A. 5th), certiorari denied, 260 U. S. 721. Cf. *United States* v. *Stever,* 222 U. S. 167.

Petitioners cite no cases to the contrary. *United States* v. *Young,* 232 U. S. 155, and *Moore* v. *United States,* 2 F. (2d) 839 (C. C. A. 7th), upon which they rely, do not involve the question of duplicity.

II

Petitioners also contend that the trial court erred in admitting evidence of various transactions which, they assert, were not in themselves criminal, were participated in by third parties or by only some of the defendants and third parties, and occurred after the returning of the indictment and in some instances subsequent to the first trial of the accused. This contention was so adequately and comprehensively answered in the opinion of the Circuit Court of Appeals (R. 223–225, 226–227) that further discussion would be repetitious.

The cases cited by the petitioners are not in conflict with the decision of the Circuit Court of Ap-

peals. They involved prosecutions in which a specific intent was not required to be proved. They recognize, however, that in a case where such an intent is an element of the offense the intent may, as was held by the court below, be established by evidence of transactions similar or kindred to that charged. Of course, as is indicated in the opinion of the Circuit Court of Appeals (R. 224), it is not necessary that such similar transactions be criminal in nature.

III

A Post Office inspector testified for the Government on rebuttal that he had asked permission of the American Benefit Association, one of the defendants, to audit its books and that permission had been refused. On cross examination by defendants' counsel, the witness was asked if he did not know that he could have made application to the District Judge for the appointment of an auditor and the judge would have ordered one. This question was objected to by Government counsel on the ground that the court had no such authority in criminal cases (R. 147–148). In sustaining the objection the Court stated (R. 148):

> Mr. Hughes, that is not true in a criminal case—there was no matter pending before the Court as to which the Court could have ordered an audit made. Furthermore, a defendant in a criminal case is not required to furnish evidence against himself, and if he

> refused to let the Government see his books, the Government has no legal means of getting at them.

Petitioners contend that the trial court misstated the law and thereby gave the jury the prejudicial picture of an act of concealment on the part of one of the defendant companies.

It would seem that if any such picture was presented to the jury it received this impression not from the statement of the court upon which petitioners' contention is based but from the testimony of the Post Office inspector, to which no objection was apparently made, that the corporation had refused him permission to audit its books. At most the court's statement was only partially wrong. It obviously could not have ordered the production of the corporation's books for an audit unless some proceeding were pending before it. Also, if any prejudice resulted from the court's statement the prejudice was one which normally would have resulted to the corporation and not to the petitioners. In any event, since a full transcript of the evidence is not contained in the Record (see R. 207–212), the petitioners clearly are not in a position to urge that reversible error resulted, a conclusion which could only be reached after an appraisal of the evidence against them.

CONCLUSION

Petitioners' contentions were carefully reviewed and properly rejected by the Circuit Court of Ap-

peals. There exists no conflict of decisions and there is involved no important question of federal law. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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